

**VOCA Corporation and VOCA Corporation of West Virginia, Inc. and District 1199, The Health Care and Social Service Union, SEIU, AFL-CIO**

**VOCA Corporation and VOCA Corporation of Ohio, Inc., VOCA Corporation of Washington, D.C., and VOCA Corporation of West Virginia, Inc. and Service Employees International Union, AFL-CIO.** Cases 9-CA-32133-2 and 9-CA-32278

September 30, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On May 22, 1996, Administrative Law Judge Judith A. Dowd issued the attached decision. The General Counsel filed exceptions and a supporting brief and an answering brief. The Respondent filed a limited exception, exceptions and a supporting brief, a brief in response to the General Counsel's exceptions, and a brief in reply to the General Counsel's answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions only to the extent consistent with this Decision and Order.<sup>2</sup>

The Respondent (VOCA) and its subsidiaries provide residential services to individuals who are mentally retarded or suffer from developmental disabilities. VOCA employs approximately 2700 employees in Ohio, West

Virginia, North Carolina, Maryland, and Washington, D.C. SEIU affiliates represent VOCA's employees in local bargaining units throughout these areas.

Certain of the violations found by the judge were alleged to have occurred on a corporatewide basis while others were alleged to have occurred within the Huntington, West Virginia bargaining unit. We will discuss the alleged violations and the judge's findings in that order.

1. In 1992, the Respondent adopted a corporate-wide bonus program called the VOCA Incentive Plan (VIP) and annually thereafter distributed to all its subsidiaries a publication called the VIP Program. In 1993 and 1994, the VIP Program stated that employees were eligible for the bonus program if "[y]ou are a full-time employee on the first business day of the Plan Year. . . . [and] You are not a member of a collective bargaining unit." We agree with the judge, for the reasons stated by her, that the Respondent violated Section 8(a)(1) of the Act by "the suggestion inherent in the exclusionary language that unrepresented employees will forfeit the plans' benefits if they choose union representation." *Handleman Co.*, 283 NLRB 451, 452 (1987). See also *Lynn-Edwards Corp.*, 290 NLRB 202, 205 (1988) ("It is well settled that an employer violates Section 8(a)(1) through a provision in, or a statement about, a plan that suggests that coverage of employees will automatically be withdrawn as soon as they become represented by a union or that continued coverage under the plan will not be subject to bargaining.").

2. Under VOCA's established VIP policy, employees who transferred from a nonunion to a union-represented facility were paid a pro rata share of the VIP bonus for the time worked in the nonunion facility. At meetings held on January 20 and March 16, 1995, the VOCA Corporation Compensation Committee ("compensation committee" or "committee") reviewed this policy and decided that it should be eliminated. The committee was composed of employees and managers from different regions of the corporation. After each meeting, the committee's actions for that date were incorporated into the committee's minutes which, at the direction of the chairman of VOCA's board, were posted at all VOCA facilities for employees to see. The minutes of the January 20 minutes state, "The Committee discussed and approved changes to the 1995 VIP:

1. An employee who begins the year as non-union but changes to a bargaining unit job is not eligible for a bonus (previously a partial bonus was paid based on prorated hours).

2. An employee who begins the year in a bargaining unit job and changes to a non-union job is not eligible for a bonus until the 2nd half of the year (no change)."

The January 20 minutes also state that "a new 1995 brochure is expected to be available in March."

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent has also excepted to the judge's inclusion of the words "wholly-owned subsidiaries" in her decision. The Respondent contends that this description is factually inaccurate. Since the judge granted the General Counsel's motion, made at the hearing, to delete these words from the case caption, we find merit in the Respondent's exception. Accordingly, we have deleted the words "wholly-owned subsidiaries" from the case caption. This deletion, however, does not affect the judge's finding, with which we agree, that the Respondent is a single employer. In this regard, the judge found that "VOCA and its subsidiaries" constituted a single employer because the evidence established common ownership, common management, and centralized control of labor relations. In finding that the corporations at issue here were commonly owned, the judge relied solely on the parties' stipulation at the hearing that "all of the corporations named in the caption" shared the same board of directors, the same corporate officers, and the same shareholders. The Respondent does not now contend that this stipulation is factually incorrect.

<sup>2</sup> We shall modify the judge's recommended Order to include provisions that are in accord with our decision in *Indian Hills Health Care Center*, 321 NLRB 144 (1996), as modified in *Excel Container, Inc.*, 325 NLRB 17 (1997).

The minutes of the March 16 meeting state that “The committee discussed and recommended the following changes and/or clarifications:

2. NU to U transfer: If an employee begins the year in a non-union job but changes to a union job not eligible for VIP, then he/she is not eligible for a bonus (previously a partial bonus was paid based on prorated hours).

3. U to NU transfer: If an employee begins the year in a union job and not eligible for VIP but changes to a non-union job, then he/she is eligible for a bonus for the 2nd half of the year (no change).

The judge found that the Respondent violated Section 8(a)(1) by telling employees that their benefits would automatically be reduced because they transferred from a nonunion to union-represented facility. In its exceptions, the Respondent argues that the compensation committee minutes are not attributable to it because they do not constitute official corporate policy. We agree with the judge, for the reasons she stated, that the Respondent may be held responsible for the compensation committee’s recommendations. As the judge found, “employees [were] likely to give significant weight to the suggestions of the compensation committee as authoritative.” The judge pointed to the presence on the committee of at least two managerial employees of VOCA, its manager of budget and finance and its contract negotiator. Employees could reasonably assume that these postings were authorized by the Respondent. In finding that the Respondent may be held responsible for these announcements, we rely also on the fact that the posting of the minutes was directed by VOCA’s chairman of the board.

Employees could also reasonably assume from the wording of the minutes that the announced change in the VIP would be put into effect. Thus, the January 20 minutes expressly state that the changes were “discussed and approved” and that a new VIP brochure would likely be available in March. In disagreeing, our colleague focuses only on the purported functioning of the compensation committee, wholly ignoring how employees were likely to construe these posted minutes. The essence of the 8(a)(1) violation is the reasonable tendency of the statements to interfere with employees’ section 7 rights. We find that the posted minutes conveyed the impression that employees would lose the prorated benefit if they transferred to a union facility and became union-represented. That the Respondent never actually implemented the recommendation to eliminate the prorated benefit is irrelevant. Reading these minutes, employees reasonably could conclude that the change in the bonus plan was imminent. Regardless of actual implementation, and even if employees sensed only that implementation was a possibility, the fact remains that the announced policy change proposal was linked to union status. Thus, employees reading the minutes would reasonably con-

strue the policy change as interfering with, coercing and restraining their right to seek or retain union representation. As quoted above, statements about a benefit plan that “suggest[] that coverage of employees will automatically be withdrawn as soon as they become represented by a union” violate Section 8(a)(1). *Lynn-Edwards Corp.*, supra. Accordingly, we adopt the judge’s finding of this violation.

3. The judge also found that the Respondent committed certain violations of the Act by actions that it took in relation to the Huntington, West Virginia bargaining unit. Specifically, the judge found that the Respondent violated Section 8(a)(1) of the Act by impliedly promising benefits to bargaining unit employees if they continued to reject the Union (District 1199); Section 8(a)(5) and (1) by refusing to bargain with the Union over the payment of the bonus to the Huntington unit employees and failing to furnish requested information regarding the VIP plan; and Section 8(a)(3) and (1) by changing its established rule excluding union-represented employees from participation in the VIP program and by delaying the distribution of the VIP payment from August to October 1994. We adopt the judge’s findings of the independent 8(a)(1) and (5)<sup>3</sup> violations. However, as explained below, we reverse her findings of the 8(a)(3) violations.

All VOCA West Virginia bargaining units, including the Huntington Group Homes unit at issue here (the Huntington unit), were represented by District 1199 under a single collective-bargaining agreement effective from September 1, 1993, to August 31, 1996. On October 25, 1993, the employees in the Huntington unit voted to decertify District 1199 and the Union then filed objections to the election.

In July 1994, while the Union’s objections to the decertification election were still pending before the Board, Vincent Pettinelli, VOCA’s chairman of the Board, held a meeting of all Huntington unit employees during which he discussed, inter alia, the VIP program. At the end of the meeting, employee Rosie Smith asked Mary Bea Eaton, VOCA’s director of operations for West Virginia, whether the VIP program was only for nonbargaining unit employees. Eaton replied that as soon as the decertification election results were final, the employees would get their VIP checks and that she (Eaton) would personally place Smith’s bonus check in her hands.

Contrary to the dissent, we adopt the judge’s finding that the Respondent violated Section 8(a)(1) through Eaton’s statement to Smith that the employees would get their VIP checks as soon as the decertification election results were final. “It is well established that election results are not final until the certification is issued. Such a rule promotes stability and certainty during the transi-

<sup>3</sup> No exceptions were filed to the judge’s findings that the Respondent violated Sec. 8(a)(5) of the Act.

tion period when, due to the existence of objections or determinative challenges, the employees' choice of representative is in doubt." *W. A. Krueger Co.*, 299 NLRB 914, 915 (1990). Eaton made the statement at issue while the Union's election objections were still pending. A second election was thus still a possibility, as the Board could have found merit in the objections and ordered a new election. We therefore agree with the judge that, in this context, Eaton's statement constituted an implied promise in violation of Section 8(a)(1) that the employees would get this benefit if they continued to reject the union. See *J. J. Newberry Co.*, 249 NLRB 991, 1009-1010 (1980), *enfd.* in pertinent part 645 F.2d 148 (2d Cir. 1981) (telling part-time employees that they would now be entitled to certain benefits during the time that objections to the election were pending was "unlawful attempt . . . to promise benefits not heretofore enjoyed by the part-time employees in order to reward them for rejecting the Union and to influence their freedom of choice in the event a second election became necessary").

By letter of July 8, while the Union's objections were still pending, Eaton asked Teresa Ball, the Union's area director, for permission to distribute VIP bonuses to the employees in the Huntington unit. Union-represented employees were not eligible for the VIP bonus under the parties' extant collective-bargaining agreement. Ball responded for the Union by letter of July 19. She stated that the Union was interested in the Respondent's suggestion, but requested that the Respondent's offer to extend the VIP bonus be made available, not just to the Huntington unit employees, but to all employees covered by the collective-bargaining agreement. The Union's letter also requested certain information about the VIP program.

On August 9, the Respondent provided some, but not all, of the requested information. Discussion of the VIP bonus went no further. After the Board upheld the results of the decertification election on September 30, the Respondent gave the Huntington unit employees the VIP bonus. Under the VIP program, the bonus is distributed in August.

On these facts the judge found that, by its July 8 letter to the Union, the Respondent discriminatorily changed its VIP eligibility policy to reward employees who had opposed union representation, in violation of Section 8(a)(3). She also found that the same July 8 letter constituted a request to engage in bargaining, specifically, a request that the Union waive the collective-bargaining agreement so that the Huntington unit employees could receive the VIP bonus.

The judge then found that, by its July 19 response, the Union, rather than waiving the contract, made a counterproposal for a broader distribution of the VIP bonus. By failing to honor this further request for bargaining, the judge found, the Respondent violated Section 8(a)(5), as

it did by refusing to provide all the information about the VIP program requested by the Union. Finally, the judge found that by postponing the distribution of the bonus from August until October, the Respondent violated Section 8(a)(3). The Respondent has excepted to the judge's 8(a)(3) findings, but not to the finding of an 8(a)(5) violation.

Our analysis begins with the Respondent's basic legal obligation as of July 8 (the date of its letter to the Union) to continue bargaining with the Union as its unit employees' representative. At that time, the Union's objections to the decertification election were still pending before the Board. Until the results of the election were final, the Respondent's bargaining obligation continued. See *W.A. Krueger Co.*, *supra*, 299 NLRB at 915 ("a union ostensibly losing a decertification election remains the established bargaining representative of unit employees until the certification of results issues"). Accordingly, "any unilateral changes made before the certification issues violate Section 8(a)(5)," and no change in the basic relationship between the parties and in the parties' obligations to bargain is effective until the certification issues. *Id.*

We find that the judge's 8(a)(3) findings are legally incompatible with the Respondent's continuing statutory obligation to bargain with the Union until the September 30 certification of results issued. The Respondent was required to notify the union of any proposed changes in the employees' terms and conditions of employment. This is what the Respondent did by its July 8 letter to the Union. Indeed, the judge found that the letter constituted a request that the Union bargain, specifically that it agree to waive the terms of the collective-bargaining agreement so Huntington unit employees could receive the bonus. To conclude, as the judge did, that the July 8 offer constituted both a request for bargaining and a discriminatory change in policy to reward the Huntington employees for voting to decertify the Union seems to us inconsistent. We find that the Respondent was simply fulfilling its legal obligation and therefore can not sustain the judge's finding that by making this proposal (or offer to bargain) the Respondent discriminatorily changed the VIP bonus eligibility policy in violation of Section 8(a)(3).

The judge also found that the Respondent was legally required to give the Huntington unit employees the VIP bonus at the scheduled distribution time in August and that it violated Section 8(a)(3) by delaying the distribution until after the decertification results were final. In her view, the Respondent was motivated by an intent to undermine support for the Union. She found that the delay "enabled VOCA to drive home to employees the connection between receiving VIP bonuses and decertification of District 1199."

Had the Respondent paid this bonus in August, however, it clearly would have unilaterally changed contrac-

tual terms and violated Section 8(a)(5). As shown by its July 19 counterproposal, the Union did not waive its bargaining rights on this subject. Nor, as of August, had the parties reached agreement on the issue. In these circumstances, by waiting until October (after the Union was decertified and the Respondent was therefore no longer obligated to bargain with the Union) to distribute the VIP bonus, the Respondent was simply fulfilling its legal obligations. Therefore, we do not agree with the judge that the “delay” in distributing the bonus was discriminatorily motivated.

Assuming *arguendo* that the judge was correct in inferring a discriminatory motive for the delay, we find that the Respondent has met its *Wright Line*<sup>4</sup> burden of showing that it would not have distributed the bonus to the Huntington unit employees in August even absent that motivation. The Respondent could not lawfully have made the distribution in August without the Union’s consent. The Respondent’s continuing duty to bargain with the Union until the decertification was final acts as a *Wright Line* defense to the 8(a)(3) allegations of the complaint. Accordingly, we shall reverse the judge’s finding of this 8(a)(3) violation, as well.

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and orders that the Respondent, VOCA Corporation, VOCA Corporation of Ohio, Inc., VOCA Corporation of Washington, D.C., and VOCA Corporation of West Virginia, Inc., Huntington, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified and set forth in full below.

##### 1. Cease and desist from

(a) Interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act by issuing a VIP program statement that automatically excludes union-represented employees from participation, by announcing a discriminatory reduction of benefits for union-represented employees, and by impliedly promising an additional benefit to employees if they reject or continue to reject union representation.

(b) Refusing to bargain upon request with District 1199 and refusing to provide District 1199 with information that is relevant to, and necessary for, collective bargaining.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Provide District 1199 with information concerning the gross amount of dollars involved in the VIP program.

(b) On request, bargain with District 1199 over extension of the VIP program to employees in the West Virginia bargaining units represented by District 1199.

(c) Within 14 days after service by the Region, post at its headquarters facility and other facilities copies of the attached notice marked “Appendix.”<sup>5</sup> Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 17, 1994.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER BRAME, concurring and dissenting in part.

I agree with my colleagues that the Respondent violated Section 8(a)(1) of the Act by excluding union-represented employees from participation in the VIP program,<sup>1</sup> and Section 8(a)(5) by refusing to bargain with the Union and provide requested information. I also agree with my colleagues that the judge’s 8(a)(3) findings must be reversed.<sup>2</sup> Contrary to my colleagues, how-

<sup>5</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

<sup>1</sup> In adopting the judge’s finding of this violation, I do not rely on the judge’s observation, set out at fn. 1 of her decision, that the Respondent corrected the offending language in its 1995 edition of the VIP Program. This evidence should be excluded from consideration as, in effect, a subsequent remedial measure. See Fed. R. Evid. 407.

<sup>2</sup> In dismissing these 8(a)(3) allegations, I find it unnecessary to address *W. A. Krueger Co.*, 299 NLRB 914 (1990), a case relied on by my colleagues. The Respondent does not contend that it did not have a bargaining obligation in July and August 1994 when the events at issue here occurred.

In finding that the General Counsel had established a prima facie case that the Respondent’s actions regarding the VIP bonuses for the first half of 1994 were intended to undermine support for the Union, the judge found evidence of the Respondent’s antiunion animus in, inter alia, Eaton’s distribution of a memorandum listing decertification of District 1199 as a long-term corporate goal.

Contrary to the judge, I would not find this statement demonstrates union animus on the part of the Respondent. Such a statement that lists decertification of a union as a corporate goal is clearly lawful under

<sup>4</sup> *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

ever, I would not find that the Respondent violated Section 8(a)(1) of the Act either by impliedly promising employees an increase in benefits if they continued to reject the Union or by telling employees that their benefits would automatically be reduced because they were represented by the Union.

As to the former issue, the Respondent's employees in the Huntington, West Virginia, bargaining unit, voted to decertify the Union in an election held on October 25, 1993. Thereafter, the Union filed objections to the election. In July 1994, while the Union's objections to the election were still pending before the Board, Vincent Pettinelli, VOCA's chairman of the Board, addressed the employees in the Huntington bargaining unit and discussed with them, *inter alia*, the VIP bonus program. After the meeting, employee Rosie Smith asked VOCA's director of operations for West Virginia, Mary Bea Eaton, whether the VIP program was only for nonbargaining unit employees. Eaton replied that as soon as the decertification results were final, the employees would get their VIP checks and that she would personally place Smith's bonus check in her hands.

The judge found that Eaton's statement, that employees would get the VIP bonus as soon as the decertification results were final, constituted an implied promise of benefits. The Union having already lost the decertification election when the alleged promise of benefits was made, the judge found a violation on the ground that if the Board found merit in the Union's objections to the election and ordered a second election, the employees would know that they would only get this benefit if they continued to reject union representation. For the following reasons, I would not find this violation.

First, contrary to my colleagues, I find that Eaton's statement, *i.e.*, that the employees would get their VIP checks as soon as the decertification results were final, was lawful because it was nothing more than a truthful statement, made in response to Smith's question, that the VIP bonus program applicable to unrepresented employees would also apply to the Huntington bargaining unit employees after the Union had been decertified. See

*Fabric Warehouse*, 294 NLRB 189 (1989), *affd.* 902 F.2d 28 (4th Cir. 1990) (table); *Viacom Cablevision*, 267 NLRB 1141 (1983). There is no suggestion that the VIP bonus program is unlawful. Obviously, after decertification, which, as discussed below, had in fact already taken place, the Huntington bargaining unit employees would get that bonus. In these circumstances, it was not unlawful for Eaton, in response to a question regarding the applicability of the VIP program, to clarify that the VIP program would apply to the Huntington bargaining unit employees after decertification of the Union. The fact that Eaton explained that the employees would be eligible for the VIP program by stating that the employees "would get" the VIP bonus after the results of the previously counted vote were certified does not convert a truthful explanation of the applicability of the VIP bonus program into an implied promise of benefits.<sup>3</sup>

Further, since the decertification election had already been held and no second election was required, the unit employees had already, in effect, finally rejected the Union when Eaton made the statement at issue here. Thus, to find the violation, the judge had to assume that if a second election were necessary, the statement would be unlawful because the unit employees would understand that they would only get the VIP bonus if they continued to reject the Union, *i.e.*, voted against the Union in a second decertification election. My colleagues have adopted the judge's analysis of, in effect, this hypothetical situation to transform a correct factual response to a question into a violation. However, I cannot find a violation that depends on such convoluted reasoning grounded on speculation. For these reasons, I would reverse the judge and dismiss this allegation.

As to the second of these 8(a)(1) allegations, as explained by the judge, the VOCA Corporation Compensation Committee (the "compensation committee" or "committee") makes recommendations to higher management about matters concerning employee compensation. Employees and managers from different regions of VOCA Corporation serve on the committee. Pettinelli directed that the compensation committee minutes be

Sec. 8(c) of the Act because it "contains no threat of reprisal or force or promise of benefit." In these circumstances, the memorandum statement at issue can not provide evidence of union animus because, as Sec. 8(c) further provides, [t]he expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act." (Emphasis added.) See *Medeco Security Locks, Inc. v. NLRB*, 142 F.3d 733, 744 (4th Cir. 1998), citing *Alpo Pet Foods, Inc. v. NLRB*, 126 F.3d 246, 252 (4th Cir. 1997) ("speech protected by [Sec. 8(c)] cannot be used by the General Counsel to establish an employer's anti-union animus"); *Holo-Krome Co. v. NLRB*, 907 F.2d 1343, 1345-1347 (2d Cir. 1990), and cases there cited.

Indeed, the Board and courts have found analagous statements expressing an employer's opposition to unionization lawful. See *Mountaineer Petroleum*, 301 NLRB 801 (1991); *L'Eggs Products, Inc. v. NLRB*, 619 F.2d 1337, 1347 (9th Cir. 1980); *NLRB v. Threads, Inc.*, 308 F.2d 1, 8-9 (4th Cir. 1962).

<sup>3</sup> *J. J. Newberry Co.*, 249 NLRB 991 (1980), a case relied on by the majority to support its finding that Eaton's statement constituted an implied promise of benefits, is easily distinguishable. In that case, while objections to an initial representation election were still pending, the respondent told part-time employees that they would now be entitled to certain benefits. There was no lawful basis for this statement and the judge found that it constituted an unlawful attempt to reward employees for rejecting the union and to influence their freedom of choice in the event of a second election. *Id.* at 1009-1010. In the present case, by contrast, as explained above, when the results of the decertification election became final, the employees would be eligible to participate in the VIP bonus program. Thus, Eaton's statement here was not an attempt to "reward" the employees for rejecting the Union, but rather an explanation of the legal consequences of that event. As such, Eaton's statement cannot be construed as an implied promise of benefits.

posted at all VOCA facilities so that the employees could see them.

On January 20 and March 16, 1995, the compensation committee reviewed VOCA's policy that employees who transferred from nonunion to union-represented facilities should be paid a pro rata share of the VIP bonus for the period of time worked in the nonunion facility. The committee's recommendation that this policy be eliminated was incorporated into the compensation committee minutes for those dates.

Applying the doctrine of apparent authority,<sup>4</sup> the judge found that the Respondent violated Section 8(a)(1) by announcing to the employees through the compensation committee minutes that union-represented employees would no longer be eligible for prorated bonuses when transferring from non-union to union-represented facilities. In reaching this conclusion, the judge found that the employees would "view the minutes of the committee as authoritative" because two management officials, Amy Schultz Prather, who, as VOCA's manager of budget and finance, administered the VIP program, and Sandi Kiser-Griffith, who represented VOCA at contract negotiations, were on the twelve person committee. Thus, the judge found, in effect, from Schultz Prather's and Kiser-Griffith's mere presence on the compensation committee, that employees would reasonably believe that the compensation committee spoke and acted for management and therefore reflected company policy. Contrary to my colleagues, I would reverse the judge and dismiss this allegation.

In finding that the Respondent was responsible for the compensation committee minutes, the judge gave too much weight to the fact that Schultz Prather and Kiser-Griffith were on the committee and she failed to consider properly the Respondent's contention that the compensation committee did not reflect corporate policy. As to the former issue, Pettinelli testified without contradiction that the compensation committee was comprised of representatives from different employee levels throughout the corporation so that each member of the committee would represent "a grouping of employees" and that the minutes were posted "to assure total input within the corporation."<sup>5</sup> (Tr. 215-216.) As to the latter issue, Pet-

tinelli further testified without contradiction that the purpose of the compensation committee was to make recommendations to senior managers at the corporate level who, in turn, chose to recommend all or parts of the compensation committee's recommendations to VOCA's board of directors, and that only the board of directors could establish official corporate policy.<sup>6</sup> Thus, rather than reflecting official policy, it is clear that the minutes set out only a representative committee's recommendations and that they are posted to invite employee response.<sup>7</sup> Accordingly, I find no basis for assuming that the employees "would reasonably believe that the [compensation committee] was reflecting company policy and speaking and acting for management" through the posted committee minutes.<sup>8</sup> I would therefore reverse the judge and dismiss this 8(a)(1) allegation also.

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act by issuing a VIP program statement that automatically excludes union-represented employees from participation, by announcing a discriminatory reduction of benefits for union-represented employees, and by impliedly promising an additional benefit to employees if they reject or continue to reject union representation.

from employees regarding compensation matters and is always willing to consider any concern expressed by an employee."

<sup>6</sup> Thus, in the present case, although the compensation committee minutes for January 20, 1995 (G.C. Exh. 33), state that the committee "discussed and approved" the policy at issue here, as the judge herself noted, the policy was never put into effect. According to Pettinelli's uncontradicted testimony, the board of directors had not approved it.

<sup>7</sup> In the absence of any evidence that employees were unaware of the committee's function, and given that the compensation committee minutes on their face (see fn. 5, above) solicit employee input, I cannot agree with the majority that the minutes have had a "reasonable tendency . . . to interfere with employees' section 7 rights."

<sup>8</sup> See fn. 4, above.

<sup>4</sup> As explained in *Southern Bag Corp.*, 315 NLRB 725, 725 (1994):

The Board applies common law principles when examining whether an employee is an agent of the employer. Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question. . . . The test is whether, under all the circumstances, the employees "would reasonably believe that the employee in question [the alleged agent] was reflecting company policy and speaking and acting for management." (Citations omitted.) *Waterbed World*, 286 NLRB 425, 426-427 (1987).

<sup>5</sup> Pettinelli's testimony in this regard is supported by the statement in the Compensation Committee's minutes for the January 20, 1995 meeting (G.C. Exh. 33) that "[t]he Committee invites direct correspondence

WE WILL NOT refuse to bargain upon request with District 1199 and WE WILL NOT refuse to provide District 1199 with information that is relevant to, and necessary for, collective bargaining.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL provide District 1199 with information concerning the gross amount of dollars involved in the VIP program.

WE WILL bargain, upon request, with District 1199 over extension of the VIP program to employees in the West Virginia bargaining units represented by District 1199.

VOCA CORPORATION, VOCA CORPORATION OF OHIO, INC., VOCA CORPORATION OF WASHINGTON, D.C., AND VOCA CORPORATION OF WEST VIRGINIA, INC.

*Engrid Emerson Vaughan, Esq.*, for the General Counsel.  
*Thomas J. Wiencek, Esq.*, of Cleveland, Ohio, and *Paul L. Bittner, Esq.*, of Dublin, Ohio, for VOCA Corporation.  
*Michael J. Hunter, Esq.*, of Columbus, Ohio, for the Charging Party.

## DECISION

### STATEMENT OF CASE

JUDITH A. DOWD, Administrative Law Judge. In Case 9–CA–32133–2, District 1199, the Health Care and Social Service Union, SEIU, AFL–CIO (District 1199), filed charges and amended charges alleging that VOCA Corporation and its wholly owned subsidiary, VOCA Corporation of West Virginia, Inc. (VOCA and VOCA West Virginia) had engaged in certain unfair labor practices which violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). In Case 9–CA–32278, Service Employees International Union AFL–CIO (SEIU) filed charges and amended charges alleging that VOCA Corporation and its wholly owned subsidiaries, VOCA Corporation of Ohio, VOCA Corporation of Washington, D.C., and VOCA Corporation of West Virginia (VOCA and its subsidiaries) violated Section 8(a)(3) and (5) of the Act. On November 30, 1994, the Board’s Regional Office for Region 9 issued an order consolidating cases, consolidated complaint and notice of hearing (complaint) alleging that VOCA and its subsidiaries violated Section 8(a)(1) of the Act by maintaining a bonus plan which excluded all union-represented employees from participation and Section 8(a)(1) and (3) of the Act by, on or about August 1994, failing to distribute bonus checks to employees who were represented by SEIU affiliates, in order to discourage employees from engaging in union activities. The complaint further alleged that VOCA and VOCA West Virginia violated Section 8(a)(1) of the Act by impliedly promising, in June or July 1994, that employees would receive increased benefits if District 1199 lost a decertification election and Section 8(a)(1) and (5) of the Act by failing and refusing since August 9, 1994, to provide information to, and bargain with, District 1199 concerning the VIP bonus program.

This case was tried at Huntington, West Virginia, on May 23, 24, and 25, 1995. At the hearing, all parties were repre-

sented and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. During the course of the hearing, the General Counsel amended the complaint to add an allegation that VOCA violated Section 8(a)(1) of the Act by announcing a discriminatory reduction in benefits for union-represented employees. Following the close of the hearing, VOCA Corporation and the General Counsel filed briefs. Counsel for District 1199 adopted the brief for the General Counsel. On consideration of the entire record including my observation of the witnesses and their demeanor, as well as the briefs filed by the parties, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

The complaint alleges, the answer admits, and I find that VOCA and its subsidiaries, at all material times, has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. THE LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that at all material times herein, SEIU and District 1199 have been labor organizations within the meaning of Section 2(5) of the Act.

#### III. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. The 1993 and 1994 VIP Program Statement

VOCA and its subsidiaries are engaged in providing residential services to individuals who are mentally retarded or suffer from developmental disabilities. VOCA employs approximately 2700 employees in Ohio, West Virginia, North Carolina, Maryland, and Washington, D.C. SEIU affiliates represent VOCA employees in bargaining units throughout those locales.

In 1992, VOCA adopted a corporatwide bonus program called the VOCA Incentive Plan (VIP). Under the plan, eligible employees could earn two types of bonuses—a bonus of 2.5 percent of their base pay if their individual group home attained 95 to 100 percent of its annual profit target (unit bonus) and another 2.5 percent if all VOCA group homes reached 95 to 100 percent of their profit targets (company bonus). After the VIP was instituted, VOCA annually distributed to all of its subsidiaries a publication explaining the VIP program. In 1993 and 1994, the VIP program statement contained the following rules governing employee eligibility for participation in the bonus program:

You are eligible for a bonus if:

You are a full-time employee on the first business day of the Plan Year. . . .

You are not a member of a collective bargaining unit.

It is well settled that an employer violates Section 8(a)(1) of the Act through a provision in, or a statement about, a plan which suggests that employees who choose union representation will automatically be excluded from participation or that continued coverage under the plan will not be subject to bargaining. See *Hertz Corp.*, 316 NLRB 672 (1995); *Phelps Dodge Mining Co.*, 308 NLRB 985, 995 (1992); *Niagara Wires*, 240 NLRB 1326 (1979). As the Board has stated:

“What is unlawful is the suggestion inherent in the exclusionary language that unrepresented employees will

forfeit the plan's benefits if they choose union representation." *Handleman Co.*, 283 NLRB 451, 452 (1987).

In this case, VOCA and its subsidiaries informed employees that they were automatically ineligible for VIP bonuses if they chose to be represented by a union in a collective-bargaining unit. After reading the plan statement, employees would tend to be discouraged from exercising their right to engage in union activities, since, according to the plan statement, membership in a union meant automatic disqualification from receiving a bonus. Furthermore, there is no suggestion in the VOCA program statement that union-represented employees could become eligible to receive VIP bonuses if their bargaining representative negotiated this benefit for them. The Board has held that exclusionary language similar to that used by VOCA in its 1993 and 1994 VIP program statement violates Section 8(a)(1) of the Act.<sup>1</sup> *Hertz Corp.*, 316 NLRB 1326 (1995); *Dura Corp.*, 156 NLRB 285 (1965), enfd. 311 F.2d 219 (2d Cir. 1962), cert. denied 372 U.S. 977 (1963).

#### B. The Alleged Implied Promise of Benefits

All VOCA West Virginia bargaining units, including the Huntington Group Homes unit (Huntington unit) were represented by District 1199, under a single collective-bargaining agreement effective from September 1, 1993, to August 31, 1996. On October 25, 1993, VOCA employees in the Huntington unit voted to decertify District 1199 and the Union filed objections to the conduct of the election. About July 1994, while union objections to the conduct of the decertification election were still pending before the National Labor Relations Board (the Board), the chairman of the board of VOCA Corporation, Vincent Pettinelli, held a meeting of all of the Huntington employees. He discussed, among other topics, the VIP bonus program. At the end of the meeting, employee Rosie Smith asked Mary Bea Eaton, VOCA's director of operations for West Virginia, whether it was true that the VIP bonus was only for nonbargaining unit employees. Eaton replied that as soon as the decertification election results were final, the employees would get VIP checks and that she would personally place Smith's bonus check in her hands.

In evaluating employer conduct which allegedly violates Section 8(a)(1) of the Act, the test is "whether the employer engaged in conduct which reasonably tends to interfere with, restrain, or coerce employees in the free exercise of rights under the Act." *NLRB v. Almet, Inc.*, 987 F. 2d 445 (7th Cir. 1993); *Reeves Bros., Inc.*, 320 NLRB 1082 (1996). It is well-settled that an employer violates Section 8(a)(1) of the Act by impliedly promising employees additional pay or other improved benefits if they reject union representation. *P.A. Incorporated*, 248 NLRB 491 (1980); *Grimes Mfg.*, 250 NLRB 254 (1980).

Here, Eaton held out the promise that employees would receive VIP bonuses if they continued to reject representation by District 1199. Although the employees had already voted to decertify District 1199, union objections to the conduct of the elections were still pending before the Board. At the time Ea-

Eaton talked to Smith, it was possible that the Board could have overturned the results and ordered a new election. Smith and other similarly situated employees were therefore vulnerable to an implied promise of benefits if they voted against District 1199 in any rerun election. I find that Eaton's statement to employee Smith—that employees would get VIP checks as soon as the decertification results were final—constituted an implied promise of increased benefits if employees continued to reject union representation.<sup>2</sup> I therefore find that VOCA and VOCA West Virginia violated Section 8(a)(1) of the Act by promising employees increased benefits in order to undermine support for the Union.

VOCA contends that it cannot be held liable for unfair labor practices committed by officials of its subsidiary corporations because they are independent corporate entities. VOCA's contention is without merit. Derivative liability may be imposed upon nominally separate businesses which the Board finds are so closely related that they comprise a single integrated enterprise. *Iron Workers Local 15*, 306 NLRB 309, 310-311 (1992); *Emsing's Supermarket, Inc.*, 284 NLRB 302 (1987). In determining whether two or more companies constitute a single employer, the controlling criteria are (1) common ownership, (2) integration of operations, (3) common management, and (4) centralized control of labor relations. *Radio & Television Broadcast Technicians Local 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255 (1965). In this case, at least three of the factors indicate that VOCA and its subsidiaries are a single employer. Common ownership is established because VOCA stipulated that all of the VOCA subsidiaries have the same board of directors, the same officers and the same shareholders. There is insufficient evidence to determine whether all of VOCA's operations are integrated. However, common management is established through evidence showing that each of the regional directors of VOCA's subsidiary companies is an employee of VOCA corporation. VOCA's organizational charts also show that the regional operations and facilities are under the VOCA corporate umbrella. Most significantly, there is substantial evidence of centralized control of labor relations. The collective bargaining agreement covering the West Virginia units is between VOCA Corporation and District 1199 and it was signed by Eaton, acting on behalf of VOCA. VOCA benefit programs are typically made available to all employees corporate wide. The evidence with respect to the VIP program also shows that corporate level employees exercise significant control over the way in which the benefits are administered. Throughout his testimony, VOCA's chairman of the board, Vincent Pettinelli, referred to the 2700 employees of VOCA and its subsidiaries as VOCA employees. Vacancies at any of

<sup>1</sup> It should be noted that in 1995, VOCA changed its VIP eligibility statement to read: "You are eligible for a VIP payment . . . if . . . You are not a member of a collective-bargaining unit (unless the terms of the VIP have been negotiated into your collective bargaining agreement)."

<sup>2</sup> VOCA contends that this same issue of an implied promise of benefits was litigated in the decertification election proceeding and that the finding therein—that Eaton's statement did not constitute a promise of improved benefits but was a factual explanation of nonunion employees' wages and benefits—is res adjudicata for purposes of this unfair labor practice proceeding. The record reflects that although an objection concerning alleged promises of benefits by Eaton was litigated in the decertification proceeding, the statements by Eaton in that case are substantially different from the statement Eaton made here. In any event, findings in a representation case concerning even precisely the same conduct that is the basis of an unfair labor practice complaint are not binding in the unfair labor practice proceeding. See *Eidal International Corp.*, 224 NLRB 911, 912-913 (1976); *Telex Corp.*, 171 NLRB 1155, 1172-1173 (1968), and cases cited; *Wagner Industrial Products Co.*, 162 NLRB 1349, 1353-1357 (1967).

the facilities of VOCA and its subsidiaries are posted for bid and any employee may transfer to a posted job in another subsidiary's facility. Under the circumstances of this case, I find that VOCA Corporation and its subsidiaries are a single employer.

### C. *The Alleged Refusal to Provide Information*

On July 8, 1994, VOCA's Mary Bea Eaton wrote to Teresa Ball, area director for District 1199, requesting permission to distribute VIP bonus checks to the Eighth Avenue and Virginia Avenue employees of the Huntington unit. In her reply of July 19, 1994, Ball tentatively agreed to the distribution pending review of information about the VIP. Ball requested "[t]he gross amount of dollars involved," how VOCA determines who is an eligible employee, and why bonus money was only available to Huntington employees.

On August 9, 1994, Eaton replied as follows:

The VIP program is only available to employees not in the bargaining unit. As you know, it is expensive for a company to be unionized. Cost associated with grievance and arbitration hearings, and travel time ad [sic] up to an additional 25% of cost.

Eligible homes are those that made 95% of their budget. We have very few of these for the 1st half of 1994, however two of these homes are in Huntington. We would like to distribute these incentives knowing that we are pending the final decertification decision. This amount is approximately 2% of the individual wage with the other 3% being paid in February of 1995 pending positive budget results. . . . I would like to distribute these bonuses to 8th Avenue and Virginia Ave. group home employees.

Please let me know as soon as possible as these checks are scheduled to be distributed in August.

It is well settled that an employer has a statutory obligation to provide a union with information that it needs for the proper performance of its duties as collective-bargaining representative. *NLRB v. Acme Industrial*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956). This duty to provide information includes information relevant to contract administration and negotiations. *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994). In determining whether an employer is obligated to supply particular information, a broad discovery standard is applied and the only question is whether there is a "probability that the desired information [is] relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." *NLRB v. Acme Industrial*, 385 U.S. at 437 and fn. 6.

It is uncontested that Eaton provided all of the information requested by District 1199, except for the gross amount of dollars involved. Eaton's letter does not dispute the appropriateness of this request. Information concerning the gross amount of dollars devoted to the VIP program was relevant and necessary for District 1199 to properly perform its collective-bargaining duties. The fact that VOCA offered bonuses of up to 5 percent of base pay to nonrepresented employees meant that VOCA had financial resources available for employee compensation that were being devoted exclusively to nonrepresented employee bonuses. District 1199 was entitled to know how much money had been set aside by VOCA for the VIP program, since some of those funds presumably could be used for higher wages for all bargaining unit employees or to extend

the VIP bonus program to union-represented employees. The information requested by District 1199 was relevant to, and necessary for, the proper performance of its bargaining duties and the failure of VOCA West Virginia to provide this information violated Section 8(a)(1) and (5) of the Act.<sup>3</sup>

### D. *The Alleged Refusal to Bargain*

In Ball's July 19th reply to Eaton's proposal to distribute bonus checks, Ball not only requested information about the VIP program, she also added the following. Ball wrote "we (District 1199 and its officials) represent VOCA employees throughout West Virginia and feel that the Bonus should be distributed to all Bargaining Unit VOCA West Virginia employees."<sup>4</sup>

"[W]hile a request to bargain is a prerequisite to the employer's duty to bargain . . . the request need take no special form, so long as there is a clear communication of meaning." *Armour & Co.*, 280 NLRB 824, 828 (1986), quoting from *Scobell Chemical Co. v. NLRB*, 267 F.2d 922, 925 (2d Cir. 1959). Whether there has been a clear communication of a request to bargain does not depend entirely upon the words employed by the party making the request. The Board has also examined the factual setting underlying the request. See *Dubuque Packing Co.*, 303 NLRB 386, 398 (1991), and cases cited in footnote 36, holding that a request for information is tantamount to a request for bargaining.

In effect, Eaton's letter to Ball was a request for a union waiver of the terms of the collective-bargaining agreement, so that VOCA could pay certain unit employees VIP bonuses not provided for in the contract. District 1199 responded by requesting more information about the VIP, pointing out that District 1199 represents all West Virginia bargaining unit employees, and taking the position that VIP bonuses should be paid to all represented employees. Under these circumstances, where VOCA created a bargaining situation by requesting a union waiver of the contract terms, and District 1199 responded with a request for information and a counterproposal, VOCA should have understood that District 1199 was attempting to engage in bargaining. I therefore find that Ball's July 19, 1994, letter contained a request for bargaining which VOCA West Virginia failed or refused to honor. This refusal to bargain over the VIP violated Section 8(a)(1) and (5) of the Act.

### E. *The Alleged Discriminatory Failure to Distribute VIP Bonus Checks*

VOCA did not distribute VIP bonuses to employees in the Eighth Avenue and Virginia Avenue homes as scheduled, in August. On September 30, 1994, the Board affirmed the results of the Huntington decertification election and decertified District 1199. In October 1994, VOCA distributed VIP bonus checks to employees in the Eighth Avenue and Virginia Avenue group homes of the Huntington unit.

Section (a)(3) of the Act makes it an unfair labor practice for an employer, "by discrimination in regard to...any term or con-

<sup>3</sup> VOCA's contention in its brief that Eaton provided District 1199 with the gross amount of dollars involved by stating that employees receive 2 percent of their individual wage and an additional 3 percent "pending positive budget results" is unmeritorious on its face.

<sup>4</sup> In addition to the Huntington unit, the West Virginia bargaining units consist of the Logan Group Homes; the Princeton Group Homes; the Beckley, Oak Hill, Lewisburg, Summersville Group Homes, and the Greenbrier Center.

dition of employment to encourage or discourage membership in any labor organization.” 29 U.S.C. 158 (a)(3). “The policy of the Act is to insulate employees’ jobs from their organizational rights.” *Radio Officers v. NLRB*, 347 U.S. 17, 40 (1954). Under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 453 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the General Counsel must “make a prima facie showing sufficient to support the inference that protected conduct was a ‘motivating factor’ in the employer’s decision. Once this is established, the burden will shift to the Employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.” *Wright Line*, supra at 1089 (footnote omitted). Subsequently, the Board found that it was “unnecessary formally to set forth [the *Wright Line*] analysis . . . where an administrative law judge has evaluated the employer’s explanation for its action and concluded that the reasons advanced by the employer were pretextual, [which] determination constitutes a finding that the reasons advanced by the employer either did not exist or were not in fact relied upon.” *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981).

The General Counsel introduced sufficient evidence in this case to establish a prima facie case that VOCA’s actions regarding VIP bonuses for the first half of 1994 were intended to undermine employee support for the Union. Evidence of anti-union animus includes the exclusionary language of the 1993 and 1994 VIP program statement and Eaton’s unlawful promise of benefits to employees if they supported decertification of District 1199. Antiunion motivation is also evidenced by Eaton’s distribution of a memorandum on November 5, 1993, listing decertification of District 1199 as a long-term corporate goal.<sup>5</sup>

In my view, however, the discrimination took two forms. It originated with VOCA’s determination that the Eighth Avenue and Virginia Avenue employees were eligible for VIP bonuses. VOCA’s own evidence shows that it had an established policy of excluding from bonus eligibility all union-represented employees who were covered under collective-bargaining agreements that did not include the VIP. The Eighth Avenue and Virginia Avenue employees who met their VIP profit targets for the first half of 1994 were represented by District 1199 under a collective-bargaining agreement that did not include the VIP. VOCA officials understood that District 1199 still represented the Huntington unit in early 1994 and that the collective-bargaining agreement covering unit employees continued in effect. Eaton indicates as much in her July 8, 1994 letter to Ball. VOCA has also never offered any explanation why it deviated from its own rules to declare the Eighth Avenue and Virginia Avenue employees eligible for bonuses. I find that VOCA’s unexplained change in its VIP eligibility policy amounted to discrimination in favor of employees who voted to decertify District 1199. By doing so, VOCA was able to reward employees for their opposition to the Union and to insure that these employees would vote against District 1199 in any rerun election. I find that VOCA violated Section 8(a)(1) and

<sup>5</sup> VOCA argues in its brief that Eaton’s memorandum cannot be relied upon as evidence of antiunion motivation, since the corporate goals in the memorandum originated with an employee committee and not with Eaton. Whether or not Eaton originated the idea of making decertification of District 1199 a corporate goal, she endorsed the memorandum containing this antiunion statement by signing the cover letter and distributing the letter and memorandum to her habilitation directors.

(3) of the Act by discriminatorily changing its VIP eligibility policy in order to reward employees for opposing unionization. *General Clay Products Corp.*, 306 NLRB 1046 (1992).<sup>6</sup>

I agree with the General Counsel that VOCA also discriminated against the Eighth Avenue and Virginia Avenue employees by delaying distribution of their bonus checks from August to October. VOCA’s only explanation for its failure to distribute bonuses in August was that Ball refused to allow them to be distributed. This explanation is clearly pretextual, since Ball’s letter specifically states that District 1199 “could see no problem” with the distribution subject to review of the requested information concerning the VIP. Since Eaton failed to provide all of the information requested and failed to enter into bargaining with District 1199, it cannot properly attribute its delay in distributing checks to the Union. In light of VOCA’s failure to offer any credible business explanation for its delay in distributing bonus checks, the only remaining explanation is a desire to undermine support for the Union. I infer from the evidence that VOCA delayed distributing the VIP bonus checks from August to a date in October, after District 1199 had been decertified. The delay enabled VOCA to drive home to employees the connection between receiving VIP bonuses and decertification of District 1199. I find that VOCA violated Section 8(a)(1) and (3) of the Act by delaying the distribution of VIP bonus checks until after District 1199 was decertified, in order to undermine employee support for the Union. Cf. *Pennsylvania Gas & Water Co.*, 314 NLRB 791 (1994); *Great Atlantic & Pacific Tea Co.*, 166 NLRB 27, 29 (1967).<sup>7</sup>

#### F. The Announcement of a Reduction in Benefits

The VOCA Corporation Compensation Committee (the compensation committee) is composed of employees and managers from different regions of the corporation. The compensation committee makes recommendations to higher management concerning matters involving employee compensation. Vincent Petenelli, the chairman of the board of VOCA Corporation, directed that the minutes of the compensation committee be posted at all VOCA facilities, so that the employees could see them. On January 20 and March 16, 1995, the compensation committee reviewed the established VOCA policy that employees transferring from a nonunion to a union-represented facility are paid a pro rata share of the VIP bonus for the time worked in the nonunion facility. The committee recommended that this policy be changed to eliminate prorated bonuses for employees transferring from nonunion to union-represented facilities. This recommendation was incorporated into the minutes of the compensation committee for those dates.

An employer violates Section 8(a)(1) of the Act by telling employees that their benefits will automatically be reduced

<sup>6</sup> Although this allegation is not included in the complaint, I find that it was fully and fairly litigated during the hearing. Counsel for VOCA questioned Eaton about whether she acted with a discriminatory motive in determining that Eighth Avenue and Virginia Avenue employees were eligible for VIP bonuses, and Eaton denied that she did. I discredit Eaton’s testimony in that regard.

<sup>7</sup> The complaint alleges that all of VOCA’s subsidiaries discriminatorily failed to distribute VIP bonus checks in August 1994, but the evidence introduced at the hearing related only to Eighth Avenue and Virginia Avenue employees of VOCA West Virginia, who were the only groups of employees that were shown to have met their VIP profit targets. If no other union-represented employees met their profit targets, the issue of discrimination in the distribution of bonus checks does not arise.

because they are represented by a union. *Ironton Publications*, 313 NLRB 1208 (1994). Under the doctrine of apparent authority, an employer may be held responsible for statements which the employees could reasonably believe were authorized by the employer. “The test is whether, under all the circumstances, the employees ‘would reasonably believe that . . . [the alleged agent] was reflecting company policy and speaking and acting for management.’” *Southern Bag Corp.*, 315 NLRB 725, 725 (1994), quoting from *Waterbed World*, 286 NLRB 425, 426–427 (1987). See also *Aluf Plastics*, 314 NLRB 706, fn.1 (1994).

VOCA contends in its brief that the compensation committee minutes are not attributable to it because these minutes do not constitute official corporate policy. The record does not reflect the ratio of employees to managers on the committee. However, the evidence shows that at least 2 of the 12-person committee are managerial employees of VOCA. Amy Schultz-Prather is VOCA’s manager of budget and finance and Sandi Kiser-Griffith represented VOCA at union contract negotiations. The presence of Schultz-Prather on the committee is particularly significant because she administers VOCA’s VIP plan. Schultz-Prather was VOCA’s chief witness at the hearing concerning the operation of the VIP program and her testimony shows that she is extremely knowledgeable on this subject. Under these circumstances employees are likely to give significant weight to the suggestions of the compensation committee and to view the minutes of the committee as authoritative. I therefore find that VOCA violated Section 8(a)(1) of the Act by announcing to employees that union-represented employees would no longer be eligible for prorated bonuses when transferring from a non-union to a union-represented facility.<sup>8</sup>

#### CONCLUSIONS OF LAW

1. VOCA Corporation and its wholly owned subsidiaries is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

<sup>8</sup> VOCA further contends in its brief that it never implemented the suggestion of the compensation committee concerning the elimination of prorated bonuses. Actual implementation of the policy need not be shown. The test is whether the statement reasonably tends to restrain, coerce, or interfere with employees rights under Sec. 7 of the Act. I find that the recommended change in VIP policy reasonably tends to discourage employees from seeking union representation, since they would therefore be denied a prorated bonus.

2. SEIU and District 1199 are labor organizations within the meaning of Section 2 (5) of the Act.

3. VOCA Corporation and its wholly owned subsidiaries violated Section 8(a)(1) of the Act by maintaining a bonus plan during 1993 and 1994 which excludes all union-represented employees from participation and by announcing a reduction of benefits for union-represented employees.

4. VOCA Corporation and its wholly owned subsidiary, VOCA Corporation of West Virginia, Inc., violated:

(a) Section 8(a)(1) of the Act by impliedly promising an additional benefit to employees if they continued to reject union representation.

(b) Section 8(a)(1) and (5) of the Act by refusing to provide requested bargaining information to District 1199 and by refusing to bargain with it.

(c) Section 8(a)(1) and (3) of the Act by discriminatorily ignoring VOCA’s established eligibility policy for VIP bonuses in order to reward employees who opposed union representation and by delaying distribution of the bonus checks until after District 1199 was decertified, in order to discourage support for the Union.

#### THE REMEDY

Having found that VOCA Corporation and its wholly owned subsidiaries engaged in the above-described unfair labor practices, I shall recommend that they be ordered to cease and desist therefrom, to take certain affirmative action designed to effectuate the policies of the Act, and to post the notice to employees appended to this decision.<sup>9</sup>

[Recommended Order omitted from publication.]

<sup>9</sup> The General Counsel seeks backpay for all union-represented employees who were discriminatorily denied VIP bonuses in August 1994. Since I have found that only the Eighth Avenue and Virginia Avenue employees were discriminated against in the distribution of the August, 1994, VIP bonuses, and I have further found that VOCA discriminated in favor of these same employees by determining that they were eligible for bonuses, I have not included any backpay provision.